IN THE

Supreme Court of the United States

October Term, 1963

No.

JAMES W. RALPH,

vs.

HARRY ZUBIK COMPANY, INC.,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. VINCENT BURKE, JR., ESQUIRE.
1100 Peoples Bank Building,
Pittsburgh, Pa. 15222.

and

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Attorneys for Petitioner.

INDEX

Page

Opinions Below 1

Basis of Jurisdiction 2

Questions Presented for Review 3

Provisions of Law Involved 3

Statement of the Case 4

Argument and Reasons Why the Writ Should Be Granted 4

Point I. Was the petitioner denied due process in being deprived of a fair trial by the District Court's arbitrary refusal to permit introduction of impeachment evidence, and did it so far depart from the accepted and usual course of judicial proceedings that calls for the exercise of your Honorable Court's power of supervision? 4

Point II. Was the petitioner denied due process in being deprived of a fair trial by the District Court's one sided and warped charge to the jury which was in conflict with the decisions of your Honorable Court and did it so far depart from the accepted and usual course of the judicial proceedings that calls for the exercise of your Honorable Court's power of supervision? 6

Summary of Reasons for Granting this Writ 8

Appendix A Opinion of the Court 9

Appendix B 9

Constitution of United States, Amendment V Due Process 9

United States District Court for the Western District of Pennsylvania, Pre Trial Rule 5 (II) (C) 10

Certificate of Service 10

Table of Cases

PAGE

District of Columbia v. Chessin, 61 Federal Second 523 5
Sperber v. Connecticut Mutual Life Insurance Company, 190 Federal Reporter 2nd, page 2, certiorari denied 321 U. S. 798 6

Statutes

Section 33 of the Merchant Marine Act of 1920 as amended, 46 U. S. C. A. 688 (commonly referred to as the Jones Act) 3
Title 28 U. S. Code, Section 1254 (1) 2
United States Constitution, Amendment V 3, 9

Rules

Supreme Court Rules 19 1. (b) 2
United States District Court for the Western District of Pennsylvania, Pre-Trial Rule 5 (H) G 3, 4, 5, 9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Harry Zubik Company, Inc., prays that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Western District of Pennsylvania.

Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit, a copy of which is hereto annexed, Appendix A, page 8, as the same has not yet been reported in any volume of the Federal Reporter.

The Opinion of the United States District Court for the Western District of Pennsylvania is reported in 214 Federal Supplement 145 and also in the printed Record of the Court below; a certified copy of said Record is attached to the within Petition.

Basis of Jurisdiction

The judgment sought to be reviewed herein is that of the United States Court of Appeals for the Third Circuit signed July 31, 1963 and entered on the same day.

The jurisdiction of your Honorable Court is invoked pursuant to the provisions of Title 28 U. S. Code, Section 1254 (1) and the Supreme Court Rules 19 1. (b) in that the District Court has so far departed from the accepted and usual course of judicial proceedings and the Court of Appeals has sanctioned such a departure as to call for an exercise of this Honorable Court's power of supervision.

Questions Presented for Review

I. Was the petitioner denied due process in being deprived of a fair trial by the District Court's arbitrary refusal to permit introduction of impeachment evidence, and did it so far depart from the accepted and usual course of judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

II. Was the petitioner denied due process in being deprived of a fair trial by the District Court's one-sided and warped charge to the jury which was in conflict with the decisions of your Honorable Court and did it so far depart from the accepted and usual course of the judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

Provisions of Law Involved

The Constitutional provisions and statutes and rules which this case involves are all set forth in the appendix hereto, in the order set forth herein, and are as follows: United States Constitution, Amendment V; United States District Court for the Western District of Pennsylvania, Pre-Trial Rule 5 (II) G.

Statement of The Case

James W. Ralph, a seaman, brought suit in the District Court for the Western District of Pennsylvania under Section 33 of the Merchant Marine Act of 1920 as amended, 46 U.S.C.A. 688 (commonly referred to as the Jones Act), for alleged injuries sustained while working as a deckhand on the motor vessel "Prosperity" operated by Harry Zubik Company, Inc., the petitioner herein.

At the trial on June 19, 1962, in the District Court before a jury and the Honorable Louis Rosenberg, D.J. presiding, Ralph testified he was injured when operating a capstan on the M. V. "Prosperity" and the cog on the capstan did not hold and he was struck on the arm by the capstan handle.

Ralph testified he was able to see the worn teeth on the capstan where the cog was supposed to fit in.

Petitioner, Harry Zubik Company, Inc., the defendant in the within action, attempted to attack the credibility of the seaman, James W. Ralph, by showing that the teeth are enclosed in a solid cast iron shell and it was physically impossible for Ralph to see the teeth of the capstan.

As part of its defense in impeaching the seaman, Ralph, the petitioner, Harry Zubik Company, Inc., attempted to produce in court the capstan in question, to submit the M

V. "Prosperity" for a view by the jury, a scale drawing of the capstan, and the testimony of the president of the company that manufactured the capstan, but said offers were refused by the trial judge because such witnesses and evidence were not listed in the Pre-Trial Statement or at the Pre-Trial Conference. The Pre-Trial regulations of the District Court, Appendix B, page 9, specifically exclude impeachment evidence. Defendant's Pre-Trial Statement and the proceedings of the Pre-Trial Conference are listed in the Appendix for the use of the Court below, 9 (a) to 16 (a).

The District Court charged the jury in such a manner that was entirely one-sided and biased and over the objections of your petitioner.

The jury rendered a verdict in favor of the seaman Ralph in the amount of $22,000 against your petitioner and motions for new trial were refused by the District Court and the judgment affirmed by the United States Court of Appeals in a *Per Curiam* Opinion stating it perceived no substantial error in the proceedings.

ARGUMENT AND REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I

Was the petitioner denied due process in being deprived of a fair trial by the District Court's arbitrary refusal to permit introduction of impeachment evidence, and did it so far depart from the accepted and usual course of judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

Petitioner was not permitted to introduce impeachment evidence because the District Court stated that such evi

dence was not listed in the narrative Pre-Trial Statement or at the Pre-Trial Conference as required by the District Court's Pre-Trial Rules.

The Pre-Trial Rules of the United States District Court for the Western District of Pennsylvania states Rule 5 (H)(6) as follows:

> "6. Failure to make a full disclosure of the evidence during the Pretrial Conference will result in the exclusion of that evidence at that trial. The only exceptions will be (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) impeaching matter and (3) privileged matter. Insofar as the impeaching or privileged matter is known at the time of the pretrial it must be disclosed to the court alone, for determination by the court as to the requirement of disclosure."

It is readily ascertained from the reading of this Rule that impeaching matter is an exception to the disclosure at the pretrial conference and said impeaching matter offered by the petitioner was not ascertainable at the time of the Pre-Trial Conference and was admissible and the District Court's refusal was prejudicial and deprived petitioner of a fair trial.

District of Columbia vs. Chessin, 61 Federal Second 523 holds that testimony offered by either party tending to contradict testimony given by the other related to such matter under consideration is admissible.

Plaintiff, seaman Ralph, stated on direct examination that he examined the capstan in question and was able to see the worn gears. Petitioner, Harry Zulik, Company, Inc., attempted to introduce evidence that such examination was physically impossible because the gears were encased in a solid cast iron shell, but this defense was denied your petitioner because of the District Court's erroneous interpretation of its own Pre Trial Regulations.

It is submitted that rules of court may not abrogate or modify substantive law and the exclusion of such evidence deprived petitioner of a fair trial to which he is entitled.

Such departure from the usual course of judicial proceedings calls for the exercise of your Honorable Court's power of supervision.

POINT II

Was the petitioner denied due process in being deprived of a fair trial by the District Court's one-sided and warped charge to the jury which was in conflict with the decisions of your Honorable Court and did it so far depart from the accepted and usual course of the judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

The District Court, in its charge to the jury, consumed:

1. 12 pages of testimony on the discussion of the law;

2. 10 pages of testimony on the plaintiff's testimony and damages;

3. 16 lines with reference to the defendant's denials and the defendant's allegations;

4. Nothing about the defendant's testimony.

This one-sided and warped charge was prejudicial to the petitioner and deprived him of a fair trial and is in conflict with Sperber vs. Connecticut Mutual Life Insurance Company, 190 Federal Reporter 2nd, page 2, certiorari denied 321 U.S. 798:

> "While a federal trial court is not at all required to state his recollection of the evidence with nice exactitude for both sides, yet if such summary is made

it must be fair to both sides to the extent that it is not so one-sided and so warped that it must be regarded as prejudicial to one side in its effect upon the jury.

Summary of Reasons for Granting this Writ

It is apparent that petitioner was denied due process in the defense of the litigation and the decision ought to be reviewed in order to correct an error of law and the arbitrary administration of justice in depriving petitioner of its rights, and it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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and,

MARTIN E. GEARY, ESQUIRE,
921 Jones Law Building,
Pittsburgh, Pa. 15219,

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,348

JAMES W. RALPH,
v.
HARRY ZUBIK COMPANY, INC.,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 21, 1963

Before Biggs, Chief Judge, and Staley, Circuit Judge, and Steel, District Judge.

Opinion of The Court

(Filed July 31, 1963)

Per Curiam.

We have examined carefully the record in this case and have considered the arguments of the parties. We perceive no substantial error in the proceedings. Accordingly, the judgment appealed from will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit.

APPENDIX B

CONSTITUTION OF UNITED STATES

AMENDMENT V

Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PRE TRIAL REGULATIONS

United States District Court for the Western District of Pennsylvania; Pre-Trial Rule 5 (D) (6):

"(6). Failure to make a full disclosure of the evidence during the Pretrial Conference will result in the exclusion of that evidence at that trial. The only exceptions will be: (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) impeaching matter and (3) privileged matter. Insofar as the impeaching or privileged matter is known at the time of the pretrial it must be disclosed to the court alone, for determination by the court as to the requirement of disclosure.

Certificate of Service

I certify that I have served five copies of the foregoing Petition with Lloyd Engle, Jr., Esquire, attorney for the plaintiff, personally.

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Attorney for Petitioner